If this is correct, defendant was under no obligation to remunerate plaintiff at all for any plans he might draw and put up for defendant's approval. The claim therefore should be dismissed.

The question arises how far should a trial Judge's views of reliability of evidence based on demeanour of witnesses prevail? Such a *volte face* cannot in my opinion conduce to belief in his veracity, nor can it lend any weight to an impression of honesty produced by a frank and open demeanour.

For these reasons I am of opinion that the appeal should be allowed and judgment entered for the defendant with costs in this Court and the Court below.

Appeal Allowed.

ABDUL KADIR AND ANOTHER v. T. KADERBHOY.

[App. Civil Juris. (Spenser-Wilkinson, J., Russell, J. and Briggs, J.) October 6, 1948]

[K.L. — Civil Appeal No. 22 of 1948]

Control of Rent Ordinance 1948. s. 2 — Definition of premises — Whether business premises where employees sleep for the night come within the Ordinance.

In this case the plaintiff-respondent was the tenant of a shophouse and he sublet the front half-portion of the ground floor of the said shophouse to the 1st defendant-appellant. The plaintiff brought an action claiming possession of the premises. The defendants-appellants contended the premises were premises within the definition of Section 2 of the Control of Rent Ordinance 1948 and that as the rent had never been in arrears for more than 14 days the plaintiff-respondent could not bring his action without first obtaining the permission of the Rent Assessment Board. The learned Chief Justice, who tried the case, held that "premises such as these, that is, the shop part of a shophouse designed for use as a shop, rented for use as a shop and used as such, cannot become premises used for human habitation merely because three or four employees of the second defendant firm sleep in the premises at night". He therefore held that the premises did not come within the definition of premises in the Control of Rent Ordinance and gave judgment for the plaintiff-respondent. The appellants appealed against this decision.

Held, (1) that as the evidence showed that the shop was used for human habitation by the employees, it came within the definition of "premises" in Section 2 of the Control of Rent Ordinance 1948; (2) that in any case the shophouse itself as a whole came within the definition of premises and if the tenancy was considered in relation to the whole building of which the premises let were a part it must come under that definition whether or not the shop part of the building was or was not used for human habitation.

Cases referred to :—

(1) *Phillips v. Hallabran* (1925) 1 K.B. 756.

(2) *Thomas v. Ward* L.R. 6 C.P. 327.

(3) *Cohen v. Benjamin* 39 I.L.R. 10.

(4) *Gidden v. Mills* (1925) 2 K.B. 713.

APPEAL FROM JUDGMENT OF WILLAN C.J. (given below).

Joaquim (*M. Edgar* with him) for the Appellants.

W. G. W. Hastings for the Respondent.

Willan, C. J. : — The plaintiff is the tenant of the whole of the premises situated at 43 Ampang Street, Kuala Lumpur, paying a monthly rental to the owner thereof of one hundred and sixty-two dollars and fifty cents. These premises consist of a shop house of the usual type in this country, with living quarters on the first floor. On the ground floor there is a shop consisting of one room 40 feet by 13 feet in the front portion facing Ampang Street; on the ground floor at the back, opening on to the back lane at the rear of this shop house, there is a space partly covered and partly uncovered containing a latrine and accommodation for bathing. A wall separates the shop and the back premises on the ground floor, and in this wall there is a window and a door. The shop can be closed in the usual way by wooden shutters as is customary in shop houses of this kind. These facts were proved in evidence.

I inspected the ground floor of this shop house in the presence of counsel for both parties. I found that the window, as well as being shut, had an almeirah hard against it at the back, and in the shop, at the front, this window had several strips of wood nailed across it. The door was shut and bolted. At the time of my inspection there were three show cases full of cloth piece-goods in the shop, two at each side and the third across the rear of the shop. Customers were being served in the shop at the time of my inspection.

The plaintiff, as tenant of the whole of this shop house, sublet the shop portion on the ground floor (hereinafter in this judgment referred to as "the premises") to the first defendant from the 1st day of June, 1946, for a period of twelve months at a monthly rental of two hundred dollars. The tenancy agreement for this sub-letting is in writing and stipulates that at the expiration of the twelve months the first defendant shall vacate the premises. The tenancy agreement is silent as to the use to which the premises sublet under it were to be put.

Twelve days after the execution of that agreement — i.e. on the 12th day of June, 1946 — the first defendant, by a written partnership agreement, entered

into partnership with a Chinese whereby they both constituted themselves into a partnership firm under the name of "Kwong Shin Kongsi" — the second defendant in this suit — for the purpose of carrying on business in piece-goods and general merchandise in the premises. In that partnership agreement the first defendant declared that he held the tenancy of the premises on behalf of the firm. The firm opened business on or about the 20th day of June, 1946.

On the expiration of the twelve months stipulated in the tenancy agreement the plaintiff took no steps to recover vacant possession of the premises, nor was vacant possession given up. It is common ground that the first defendant continued in possession as a monthly tenant of the plaintiff.

Later, correspondence ensued between the parties, and on the 20th day of February, 1948, the plaintiff served a notice on the first defedant to quit the premises on or before the 31st day of March, 1948. The first defendant failed to carry out the terms of that notice and the partnership firm is still carrying on business in the premises.

In this suit to recover possession of the premises the defendants by their written statements of defence contend that the premises are premises falling within the definition of "premises" as defined in section 2 of the Control of Rent Ordinance, 1948, and that since the rent has not been in arrear for more than 14 days the plaintiff cannot maintain this suit without first obtaining the permission of the Rent Assessment Board in Kuala Lumpur.

In section 2 of that Ordinance

'premises' means —

(a) any dwelling-house, flat or other building used for human habitation and any part thereof let or sub-let separately, and includes premises used partly for human habitation and partly for business purposes;

(b) any other premises or part thereof let or sub-let separately at a monthly rental which does not exceed one hundred and fifty dollars.

Mr. Hastings, for the plaintiff, submitted that since the premises are a portion of the whole shop house sub-let separately for business purposes and used as such, they had ceased to be within paragraph (a) of the definition of "premises" set out above. Further, they could not come within paragraph (b) of that definition because they were sub-let at more than one hundred and fifty dollars per month. After stating that there is no local decision on the issue raised in this suit, he cited several English authorities to show that in England, where a portion of a dwelling house is sub-let for business purposes, that portion ceases to be a dwelling house and becomes solely business premises and, as such, ceases to be protected by the provisions of the various Rent Restriction Acts in England, see, for instance, *Phillips v. Hallabran*[1].

Mr. Woodward, for the defendants, replied that the tenancy agreement for sub-letting the premises in no way restricts the use to which the premises can be put, and that, in fact, the premises have been used partly for human habitation and partly for business purposes because employees of the second defendant firm e.g. salesmen, sleep in the premises at night after the shop is closed. On this Mr. Woodward submitted that the premises still come within that part of paragraph (a) of the definition of "premises" in the Control of Rent Ordinance, 1948, which reads :—

> and includes premises used partly for human habitation and partly for business purposes.

Whilst it is true that the tenancy agreement does not stipulate that the premises sub-let were to be used for business purposes, there is no doubt that the plaintiff and the first defendant knew the use to which they were to be put when they executed the tenancy agreement. This was admitted by the first defendant in evidence when he said :—

> When I got tenancy agreement I intended to use the premises for a shop.

And later :—

> Both plaintiff and I knew at time tenancy arranged that I wished to use the premises as a shop.

With regard to the evidence that the employees of the second defendant firm did sleep in the premises, there is no doubt they did. But it was admitted by the first defendant that when he entered into the tenancy agreement on the 1st day of June, 1946, he had no idea of using the premises for human habitation as well as for business purposes. On this his evidence was :—

> I had in mind to rent a place for them i.e. for the employees in which to live. Failed to find such a place so they had to live in the shop.

Further, the managing partner of the second defendant firm admitted in evidence that no employees were engaged by the firm until after the 20th day of June, 1946, i.e. twenty days after the tenancy agreement was executed.

A lot of evidence was given by, and on behalf of, the defendants that these employees were at first allowed by the plaintiff to use the latrine and the bathing accommodation on the ground floor at the back of the shop house. This was denied by the plaintiff. In the view I take of this case, whether they did or did not use the latrine and bathing accommodation is immaterial.

I find that premises were :—

(a) Sub-let for business purposes from the 1st day of June, 1946, and were used as such;

(b) Sub-let separately, and that the sub-letting of part of premises separately is recognised by the Control of Rent Ordinance, 1948;

(c) Sub-let at a rental of more than one hundred and fifty dollars per month.

Accordingly, unless the defendants can satisfy me that the premises come within that part of the definition of "premises" in paragraph (a) of section 2 of the Control of Rent Ordinance, 1948, which reads "premises used partly for human habitation and partly for business purposes" the premises are not protected by that Ordinance.

There is no doubt that the premises have been used for human habitation because employees of the second defendant firm have slept in them at night on canvas beds which are spread out in the evening and folded up and kept in the premises by day. But premises such as these, i.e. the shop part of a shop house, designed for use as a shop, rented for use as a shop and used as such, cannot become premises used for human habitation merely because three or four employees of the second defendant firm sleep in the premises at night. To hold otherwise would mean that premises to which the Control of Rent Ordinance, 1948, has no application could be brought under that Ordinance by a simple method of placing a few camp beds therein on which persons who are not caretakers sleep at night. Accordingly I hold that the Control of Rent Ordinance, 1948, has no application to the premises in question, and therefore, the plaintiff must have judgment against both defendants for possession of the premises.

Mr. Hastings agrees, having now seen the partnership agreement in agreed bundle of correspondence P1, which he had not seen when he filed the plaint, that second defendant is not a trespasser. He therefore abandons his claim under paragraph 8(3) of the plaint.

With regard to the claim under paragraph 8(2) of the plaint, Mr. Hastings and Mr. Woodward agree that rent has been paid up to and including June, 1948.

Accordingly there will be judgment jointly against both defendants for mesne profits at the rate of $400 per month from the 1st day of April, 1948, to date of recovery of possession, less $600, which is the rent already paid for April, May and June, 1948.

Costs to plaintiff against both defendants.

The Defendants appealed.

Spenser-Wilkinson, J. : — In this suit the respondent claimed from the appellants possession of the front half portion of the ground floor — i.e. the shop part — of a shop house No. 43 Ampang Street, Kuala Lumpur. The respondent was the tenant of the whole shop house and sub-let the shop to the appellants for one year under the terms of a written agreement dated 1st June, 1946. On the expiration of the year the appellants continued in occupation by consent of the respondent upon a monthly basis at a rent of $200/- per month. The appellants contested the claim for possession upon the ground that this front half portion of the ground floor fell within the definition of "premises" contained in section 2 of the Control of Rent Ordinance, 1948. The learned Chief Justice held that the definition in the Ordinance did not cover the tenancy in question and he accordingly gave judgment in favour of the respondent for possession together with mesne profits from the 1st April, 1948 to date of recovery of possession less $600/- rent already paid for the months of April, May and June, 1948. Against this decision the appellants appealed.

The question for decision in this appeal is whether or not the premises sub-let to the appellants are or not "premises" within the meaning of the definition above referred to which reads as follows :—

'premises' means —

(a) any dwelling-house, flat or other building used for human habitation and any part thereof let or sub-let separately, and includes premises used partly for human habitation and partly for business purposes;

(b) any other premises or part thereof let or sub-let separately at a monthly rental which does not exceed one hundred and fifty dollars;

and includes any land, outbuildings and appurtenances occupied therewith, but does not include furnished premises let at a rental which includes board, or new buildings completed after the commencement of this Ordinance, and, for the purposes of this definition, 'buildings used for human habitation' does not include a building which is occupied by one or more persons as caretakers only.

It is not disputed that at the time when the tenancy agreement was entered into this front half portion of the ground floor was a shop and that it continued to be used throughout all material times by the sub-tenant as a shop. It is also not disputed that from the very commencement of the appellants' occupation on the 20th June, 1946 the employees of the sub-tenant slept in the shop on canvas beds which were spread out in the evening and folded up and kept on the premises by day. It is clear, moreover, from the evidence that some at least of these employees

took their meals in the shop and that they all kept their personal belongings there, although for purposes of ablution they had to go elsewhere because there were no facilities for this in the shop. It is also material to observe that these employees had nowhere else to live.

The learned Chief Justice expressed the opinion in his judgment that although there was no doubt that the premises had been used for human habitation because employees of the second defendant firm had slept in them at night on canvas beds which were spread out in the evening and folded up and kept in the premises by day, premises such as these i.e. the shop part of a shop house, designed for use as a shop and used as such, could not become premises used for human habitation merely because three or four employees of the second defendant firm slept in the premises at night.

It seems to me that in so deciding the learned Chief Justice was much influenced by the question of the intentions of the sub-tenants when they first entered into the tenancy agreement. It is quite clear from the terms of the tenancy agreement itself that no stipulation was made therein with regard to the use of the premises so that the sub-tenant was perfectly entitled in law, whatever his original intentions may have been, to use the premises during the period of tenancy for any purposes he might think fit. I think there can be no doubt that under the wording of our Ordinance, unlike some of the English Acts, the test to be applied in ascertaining whether premises are within the definition is not the purpose of letting but the use to which the premises (subject to any covenants restricting user) are in fact put. Moreover, it does not appear to have been made as clear at the trial, as it was at the hearing of the appeal, that the arrangement whereby these employees slept in the shop had commenced as far back as June, 1946, at the time when the premises would have been as much controlled as a shop as they would be as a place for human habitation. There is no question, therefore, in this case of the sub-tenant having instituted the custom of his employees sleeping in the shop in order to affect one way or the other the incidence of the legislation controlling ejectment from premises.

In the Court below the arguments with regard to the question of whether or not these premises came within the definition in the Ordinance appears to have been based entirely on the second part of paragraph (a) of the definition which reads "and includes premises used partly for human habitation and partly for business purposes". I am of opinion, however, that the question in issue does not depend upon this part of the definition. Mr. Hastings, on behalf of the respondent, argued that the expression "partly" in this part of the definition must refer to a specific part thereof and cannot be read to refer to premises which are sometimes used in one way and sometimes in other. With this contention I agree. This shop cannot be said to have been used partly as a shop and partly for human habitation because there was no special division separating in any way the shop part from the sleeping part.

It is clear from the evidence that the room sub-let to the appellants is part of a shop-house and, therefore, part of a building used for human habitation (for the respondent lives there) and it is equally clear that this front half portion of the ground floor is a part of such a building which is sub-let separately. I think there can be no doubt if it is right to consider this tenancy in relation to the whole building of which it is a part, that it must come under the definition whether or not the shop part of the building was or was not used for human habitation.

Mr. Joaquim, however, on behalf of the appellants suggested that we must consider this letting only in relation to the actual shop which was let and it may be that when considering whether a particular tenancy does or does not come within the definition this is the correct method of approach. Looking at it from this point of view the shop part of this shop-house, not being a dwelling house or flat, comes I think within the words "any other building". (See *Thompson v. Ward*[2] per Bovill, C.J. at p. 358). It consists of four walls and a roof or ceiling and is certainly a structure. If, then it is used for human habitation it is within the definition. In my opinion there can be no question that this shop was used for human habitation. There is to my mind no doubt from the evidence that these employees lived there in the usual sense of the word; and the fact that they had nowhere else to live and no other home is, I think, conclusive on this point.

Mr. Hastings on behalf of the respondent argued that the subject matter of this tenancy was solely a shop; it was let as a shop, used as a shop and was in fact nothing else but a shop and could not, therefore, be said to be used for human habitation. I am unable to accept this argument. I quote from the report of the judgment of Bray, J. in *Cohen v. Benjamin*[3] :—

> "It had been contended.....that the question to be determined was what was the dominant use to which the premises were put. He (His Lordship) did not think that he had to decide any such question. There was nothing in the statute about dominant

use nor was there any authority for such a proposition so far as he was aware."

These words are, in my view, precisely applicable to the position here. The first part of our definition contains no qualifying words to the expression "used for human habitation". It does not say "wholely used for human habitation" or "substantially used for habitation" but simply "used for human habitation." Any dwelling house or other building, therefore, which is in fact used for human habitation must in my view come within the definition, whatever other uses the premises may be put to in addition. What has to be decided is whether or not the place is or is not used for human habitation. There may well be double user, but if there is in fact user for human habitation then in my opinion the premises come within the phrase used by the legislature whether or not there is some other user in addition even if that other user is predominant. I have cited the above authority only because it puts so clearly the view I take regarding the interpretation of the Ordinance. Except in so far as they may be of assistance on the more general aspects of the law of landlord and tenant I do not think the English authorities are of any assistance in dealing with questions which arise under our Ordinance which is different in scope and wording from the English Acts on the same subject.

The extent to which it would be possible, as a result of this decision, to bring premises within the purview of the Ordinance by the simple method of supplying a few camp beds therein on which persons who are not caretakers sleep at night would depend partly upon the facts of each particular case and partly upon the terms of the particular tenancy agreement. It may well be the policy of the legislature to provide that shops in which employees live should not be decontrolled and the fact that in the definition of "premises" in the Ordinance the sleeping of caretakers on premises has been specifically excluded from the phrase "used for human habitation" suggests that in some circumstances mere sleeping on the premises by persons other than caretakers would be use for human habitation. The definition of "premises" in the Enactment which the Ordinance replaced was wide enough to cover almost every kind of tenancy. The Ordinance therefore has the effect of introducing a certain measure of decontrol. Pure business premises rented at more than $150/- per month are in fact released from control but business premises which are part of a dwelling house, flat or other building used for human habitation are not. It is difficult to escape the conclusion that shop houses, which are such a ubiquitous form of building in this country, were intended to be kept within the control.

My conclusion is that whether the premises in question in this case are looked upon as part of the larger building of which they form a part or are considered simply as an isolated room they are in the circumstances of the case "premises" within the definition contained in section 2 of the Control of Rent Ordinance, 1948.

The result is that the appeal is allowed.

Russell, J. : — The plaintiff-respondent is the tenant of a shop-house situated at No. 43, Ampang Street, Kuala Lumpur, and on the 1st day of June, 1946, sub-let to the first defendant-appellant the front half portion of the ground floor of the said shop-house for a period of one year certain at a rental of $200/- per month. The agreement was in writing and did not stipulate for what purpose this portion of the ground floor was to be used by this defendant-appellant.

On the 12th of June, 1946, the first defendant-appellant entered into a partnership agreement with a Chinese whereby they both constituted themselves into a partnership firm for the purpose of carrying on business in piece-goods and general merchandise on the premises, and in their agreement the first defendant-appellant declared that he held the tenancy on behalf of the partnership firm. The second defendants-appellants are therefore the partnership firm. The first defendant-appellant held over at the conclusion of the period fixed in the tenancy agreement and the tenancy continued by consent on a monthly basis.

On the 20th day of February, 1948, the plaintiff-respondent served a notice to quit on the first defendant-appellant to quit the premises on or before the 31st day of March, 1948. The first defendant-appellant did not quit the premises and the partners are still carrying on their business therein. Accordingly on the 5th day of April, 1948, the plaintiff-respondent commenced an action against the defendants-appellants claiming possession of the premises, the defendants-appellants contending that the premises were premises within the definition of "premises" as defined in section 2 of the Control of Rent Ordinance, 1948, and that as the rent had never been in arrears for more than 14 days the plaintiff-respondent could not bring his action without first obtaining the permission of the Rent Assessment Board.

The learned Chief Justice found that the premises were :—

(1) sub-let for business purposes from the 1st day of June, 1946 and were used as such;

(2) sub-let separately and that the sub-letting of part of premises separately is recognised by the Control of Rent Ordinance, 1948;

(3) sub-let at a rental of more than one hundred and fifty dollars per month; and

(4) that the Control of Rent Ordinance, 1948, had no application to the premises in view of the fact that the defendants-appellants had failed to satisfy him that the premises came within that part of the definition of premises in paragraph (a) of section 2 of the above Ordinance which reads:

> "premises used partly for human habitation and partly for business purposes."

It was not disputed that a number of employees of the partnership had slept on the premises, consumed their food there and kept their belongings there and this practice would appear from the evidence to have begun in June, 1946 soon after the formation of the partnership. It would appear also that some of these employees had no other habitation whatsoever.

The learned Chief Justice also found as a fact that the premises were used for human habitation but held that "premises such as these, i.e. the shop part of a shop-house, designed for use as a shop, rented for use as a shop and used as such could not become premises used for human habitation merely because three or four employees of the second defendant firm sleep on the premises at night."

Section 2 of the Control of Rent Ordinance, 1948 reads as follows :—

'premises' means —

(a) any dwelling-house, flat or other building used for human habitation and any part thereof let or sub-let separately, and includes premises used partly for human habitation and partly for business purposes.

Mr. Joaquim for the defendants-appellants argued that the front portion of the ground floor was completely severed from the rest of the shop-house and must be treated entirely on its own merits. He pointed out that the Rent and Charged Land (Restriction) Enactment No. 14 of 1940, which was repealed by the Control of Rent Ordinance, 1948, contained a definition of "premises" that was all-embracing. The front room was let when the former Enactment was in force and the user of the room by the employees as a human habitation occurred long before the coming into operation of the Control of Rent Ordinance. He argued that whilst under English law the test whether premises are to be regarded as business premises depends primarily on the purpose for which they are let the test under the Control of Rent Ordinance is user provided that the user is not a breach of the tenancy agreement, but even in England if the lease permits of the premises being used for any lawful purpose, then it is the actual user of them at the time of the proceedings that has to be considered. This contention would appear to be correct from a statement by Mr. Justice Greer in the case of *Gidden v. Mills*[4] and referred to in *Halsbury's* Laws of England, Hailsham edition, Volume 20 page 315 para. 371. The tenancy agreement of June 1st 1946 permits the front portion of the ground floor of No. 43, Ampang Street to be used for any lawful purpose whatsoever, there being no restriction or reservation in the agreement.

Mr. Hastings who appeared for the plaintiff-respondent contended that as the front portion of the ground floor was still being used as a shop there could not be a user for a second purpose. A user for two purposes could only occur in the case of premises which were in fact divided into two separate parts, one part being used entirely for one purpose and the other part for some other purpose. If the premises were not in fact divided, the test depended upon what has been called "dominant user". This test was rejected in the English case of *Cohen and Benjamin*[3] the learned Judge pointing out that there was nothing in the statute about dominant use nor was there any authority for the proposition so far as he was aware. In that case the premises consisted of living accommodation on two floors; one of the floors, namely, the ground floor containing, in addition to living accommodation, a shop, store-room and bake house. In this country it is well known that persons actually live in the same room where in business hours business actually takes place and it so appears from the evidence in this case. There is nothing in the Control of Rent Ordinance about dominant use and I think that one and the same room may in fact be used for business purposes and also used for human habitation without any division of the room for each specific purpose.

I accept the finding of fact of the learned Chief Justice that this room was used for human habitation but I am of the opinion that he was wrong in holding that the definition in section 2 did not apply. It comes, in my view, within the first part of paragraph (a) of the definition in that it was a building used for human habitation.

Moreover it can also be said that the whole shop-house No. 43, Ampang Street was a building used for human habitation within the meaning of paragraph (a) of the definition of "premises" and on the 1st of June, 1946 a part thereof, namely, the front portion

of the ground floor was sub-let separately to the first defendant-appellant. There is nothing whatsoever in this definition that explicitly states that when any part of a dwelling-house, flat or other building used for human habitation is let or sub-let separately the purpose of such letting or sub-letting must be for the purposes of human habitation to bring the part let or sub-let within this definition. Nor do I think that such a requirement can be implied.

For these reasons I am of the opinion that these premises, the front portion of the ground floor come within the definition of "premises" in paragrah (a) of section 2 of the Control of Rent Ordinance, 1948, and I would allow this appeal.

Briggs, J. : — The facts involved in this appeal are fully set out in the judgment of the learned Chief Justice. The only issue is whether the premises in question, to which for convenience I shall refer as "the shop", were within the definition of "premises" in the Control of Rent Ordinance, 1948.

Under the Rent and Charged Land (Restriction) Enactment, 1940, "premises" were defined very comprehensively and included in general business premises of all kinds. When this tenancy was created in 1946, that Enactment was still in force, and it could never have been suggested that, by reason of the tenancy, or by reason of any particular user of the shop, the shop ceased to be premises subject to its operation. The question whether the shop was "used for human habitation" was wholly without importance at that time, and only became of importance on the 31st January, 1948, when the Control of Rent Ordinance, 1948, replaced the 1940 Enactment. No question can arise, therefore, of any sham or *mala fide* use of the shop for human habitation with the indirect motive of putting or keeping it under control. The method of user has been substantially unchanged from the outset, and was perfectly *bona fide*, whatever its effect in law. If the shop, which was formerly controlled, is now decontrolled, this change is due purely to the change in the law made by the Control of Rent Ordinance, and not to any act of either of the parties. The concluding portion of the learned Chief Justice's judgment suggests that he may momentarily have lost sight of this point.

The definition of "premises" in section 2 of the Control of Rent Ordinance, 1948, may be broken down into several parts, and it is sought to bring the shop within it in at least three different ways, which are as follows :—

(1) as being "any.....other building used for human habitation.....";
(2) as being "a part", "sub-let separately", of "any....other building used for human habitation"; and
(3) as being "premises used partly for human habitation and partly for business purposes".

In the Court below only the third of these contentions was pressed. I think it is the least convincing of the three.

The plain meaning of "partly....and partly" is "by reference to one part thereof....and by reference to the other (or another) part thereof". This seems to me necessarily to infer a spatial division of the premises according to the two purposes. Mr. Hastings succinctly puts it that "partly" does not mean "sometimes". Similarly I think "partly.....and partly" does not mean "both....and". It is quite clear that there was no spatial division of the shop according to user. If there was any division, it was only a temporal one. I do not think the shop can come within this part of the definition. It may have been used both for human habitation and for business purposes, but it was not used partly for one and partly for the other.

I pass on to the second contention set out above, that the shop was "a part", "sub-let separately", of "any....other building used for human habitation". Assuming in favour of the respondent that, immediately prior to the agreement of the 1st June 1946, the shop was either unoccupied or was used wholly for business purposes, I think that one cannot escape the conclusion that the whole shop-house, No: 43 Ampang Street, was then a "building" and was "used for human habitation". The respondent lived there on the first floor and, so far as we know, lived nowhere else. He still lives there. No objection has been made that it is in any way peculiar or wrong that he should do so. The word "habitation", with its related forms "inhabit", *et cetera,* appears to refer principally to the act of sleeping habitually in certain premises. *Stroud's Judicial Dictionary* supports this view. If No: 43 Ampang Street, was, as I conceive, a "building used for human habitation", there can be no doubt that, after the 1st June, 1946, the shop was "a part thereof....sub-let separately", whether or not the shop was itself "used for human habitation". That would conclude the issue on this appeal; but it is desirable to comment on certain further points.

The learned Chief Justice decided the case on the ground that it would be unreasonable that premises, once decontrolled, should be brought again under control, merely by allowing a few persons, other than

mere caretakers, to sleep habitually in them. This reasoning overlooks the possibility that it may have been the policy of the law to provide that premises such as the shop should not be decontrolled at all. The shop-house is both a common and an important feature of urban life in the country. Its nature can hardly have been overlooked by the legislature. They must have known, and I think the Court can take notice, that at the present time there is serious overcrowding in most urban areas, that the number of persons residing in many shop-houses is far too high, and that many persons live, or sleep habitually, in that part of them which corresponds to the shop in No: 43 Ampang Street. In those circumstances, it would not be at all strange if the legislature intended to provide that premises like that shop should not on any account become decontrolled. In contrast with the position in England, they may well have thought it proper that no part of any controlled building should be released from control merely by sub-letting it for business purposes only. I believe that in the case of a shop-house, part of which is used "for human habitation", that is the effect of the law. A separate sub-letting of the "shop" portion will not effect decontrol.

I think that further doubt can be cast on the reasoning of the learned Chief Justice by considering the concluding words of the definition of "premises", which provide that, "buildings used for human habitation" does not include a building which is occupied by one or more persons "as caretakers only". Those words appear to suggest by implication that a habitual occupation by persons other than caretakers will, or at least may, be sufficient to constitute user "for human habitation" within the definition. It is clear that the persons who habitually slept in the shop were not caretakers. They were salesmen or similar employees in the shop. Mr. Hastings contended that occupation by caretakers was excluded only on the basis that the caretakers had separate quarters assigned to them, i.e. a spatial division. I see nothing in the wording of the definition to support this submission, and I do not think that the general usage of the country accords with it. I think the wording suggests that merely incidental user "for human habitation" may be enough to satisfy the definition, provided it is not by caretakers only.

What then is required to constitute user "for human habitation"? I do not intend to attempt a generalization, and I think each case must be decided on its own facts. In this shop there were four or five persons who, besides working there, regularly slept there, had their meals there, kept their personal belongings there, had no other homes, and had apparently all that they required in the way of domestic accommodation, except that they had no kitchen, and for bathing and for the use of a latrine they had to go elsewhere. A very large proportion of the population of this country has to do the same, and the lack of those facilities on the spot cannot carry much weight. I am satisfied that those persons regarded the shop as their home, and that it was their home, and that it was "used for human habitation". The learned Chief Justice so found, and on the plain meaning of words I think he was right, although I disagree with the reasoning which led him to give those words a restricted, rather than their ordinary, meaning.

Mr. Hastings contended that the shop was used "for business purposes" which is uncontrovertible, and that therefore it could not have been used "for human habitation": but I was unable to follow his argument that, except in case of spatial division, the two users must be mutually exclusive. I see no reason why they should not co-exist. I think some confusion may have arisen on this issue from consideration of English cases, where the question was, for what purpose premises had been let. If premises are "let as a shop", no doubt they cannot also be "let as a dwelling-house", although a covenant limiting user is probably needed before one can safely predicate either. If in any case there was an express covenant against user "for human habitation", I think a *de facto* user in breach of that covenant would probably not be effective to bring under control premises previously decontrolled; but here there is no restriction on user, and no question of "recontrolling" premises previously decontrolled. It is still more important that, whereas in England the question is, for what purpose premises were let, in this country the question is, for what purpose they are used. One may perhaps say "lawfully used", to exclude a breach of contract. Entirely different considerations dictate the answer, even if that addition is made. Mr. Hastings was obliged on this point to concede that one might have to decide the question, "For what purpose is the building used?", on the ground that one user was the "dominant user", but that admission really goes to the root of his case. If there is a dominant user, there is necessarily also a subsidiary user co-existing with it. The users are no longer mutually exclusive, and the building may at one and the same time be used "for human habitation" and for "business purposes". I consider that to have been the position in this shop,

and I hold that the shop was "used for human habitation".

Mr. Hastings relied also on an allegation that the shop is unfit for human habitation. By any good standards of housing requirements, it probably is so: but it has been inspected by the authorities, and they have not seen fit to condemn it, or otherwise to prevent its being used for human habitation. Such user may be socially undesirable, but it is not unlawful, and nothing less than that would affect the situation.

Reverting to the first of the three grounds on which it is sought to bring the shop within the definition of premises, the submission that it was "any ....other building used for human habitation". For the purpose of this definition, I think a structure, whether or not one would ordinarily think of it as a unit, and in that sense a "building", can be a "building". One would normally consider the shop to be part of a building — part, in fact, of a shop-house — but I think it is also itself a "building" within the definition. On this ground also I think the shop is within the definition of "premises", under the Control of Rent Ordinance, 1948.

I would allow this appeal.

Appeal Allowed.

PUBLIC PROSECUTOR v. LEE SIN LONG.

[App. Crim. Juris. (Callow, J.) August 9, 1948]

[Malacca — Crim. App. No. 5 1948]

Common Gaming Houses Ordinance (Cap. 30) Ss. 9, 12 — Necessity for Search Warrant — Whether presumptions under s. 9 are dependent upon compliance with s. 12.

In this case the Public Prosecutor appealed against the decision of the learned Magistrate, who held that there was no case to answer, on the following grounds:—

(a) that the learned Magistrate misdirected himself in holding that the arrest and search was not carried out as required by Section 12 of the Common Gaming Houses Ordinance (Cap. 30) as amended by Section 5 of Ordinance No. 31 of 193[illegible].

(b) that the learned Magistrate, having held that the prosecution had satisfied him that **Chap Ji Ki** Lotteries and **Whah Weh** Lotteries are games of chance, should have held that the presumption under Section 9 of Cap. 30 arose against the Respondent.

It was argued in this case that unless the requirements of Section 12 of the Common Gaming Houses Ordinance as to arrest and search were fully satisfied, no presumption can arise in accordance with S. 9 of the Ordinance.

Held, (1) that Section 12 of the Common Gaming Houses Ordinance requires the provision of a warrant before there can be interference with the liberty of an individual against whom no offence within Section 30 of the Criminal Procedure Code is alleged; (2) that the presumptions in Section 9 of the Ordinance (Cap. 30) are not dependent upon compliance with Section 12 of the same Ordinance. If a person is found and prosecuted for contravention of Section 9, then he cannot evade the presumption against him by pleading non-fulfilment of Section 12 which is only to assist in apprehension and to sanction search.

Cases referred to:—

(1) *R. v. Sujjad Ali,* 3 N.W.P. 134.

(2) *Nazir Khan v. Proladh Dutta & Ors.,* I.L.R. IV Ca. 659.

(3) *Saminathan v. Public Prosecutor,* (1937) M.L.J. 39.

(4) *R. v. Carr-Briant,* (1943) 2 All E.R. 156.

MAGISTRATE'S APPEAL.

C. V. Boyle, D.P.P., for Public Prosecutor.

W. H. Salt for the Respondent.

Callow, J.: — This is an appeal by the Public Prosecutor against the acquittal by the Magistrate, Malacca, on the 17th of April, 1948.

The charges were as follows:—

1. That you on or about 11/3/48 at 4.20 p.m. at Lorong Panjang did assist in carrying on a public lottery, to wit, **Chap Ji Ki** and have thereby committed an offence punishable under Section 4(c) Cap. 30.

2. That you on or about 11/3/48 at 4.20 p.m. at Lorong Panjang did assist in the carrying on a public lottery, to wit, **Whah Weh** and have thereby committed an offence punishable under Section 4(c) Cap. 30.

The learned Magistrate held that there was no case to answer, and the appellant is dissatisfied on the following grounds:—

(a) The learned Magistrate misdirected himself in holding that the arrest and search was not carried out as required by Section 12 of the Common Gaming Houses Ordinance (Cap. 30) as amended by Section 5 of Ordinance No. 31 of 1939.

(b) The learned Magistrate, having held that the prosecution had satisfied him that **Chap Ji Ki** Lotteries and **Whah Weh** Lotteries are games of chance the learned Magistrate should have held that the presumption under Section 9 of Cap. 30 arose against the Respondent.

As the argument progressed it seemed that the grounds filed did not clearly disclose the real point at issue. It is that unless the requirements of section 12 of the Common Gaming Houses Ordinance as to arrest and search are fully satisfied, no presumption can arise in accordance with section 9 of the Ordinance.

Mr. Salt, for the respondent, argued by analogy with section 11 of the Ordinance. He cited authorities and extracts from Common Gaming Houses by *Braddell* (2nd edition pages 37 *et seq*) to show that in regard